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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

February 26, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20006

Re: Ex Parte Communication - CC Dkt. No. 95-185

Dear Mr. Caton:

I am submitting this ex parte letter on behalf of Bell Atlantic Corporation and Pacific Telesis Group in the above-captioned proceeding.[1]

The Commission has proposed, on an interim basis, to mandate "bill-and-keep" arrangements in lieu of direct compensation where local exchange carriers ("LECs") and commercial mobile radio service ("CMRS") providers terminate interconnected traffic. Notice of Proposed Rulemaking, FCC 95-505 (released Jan. 11, 1996) ("NPRM"). Even on an interim basis, such a ruling is beyond the jurisdiction of the Commission.

The Telecommunications Act of 1996, Pub. L. No. 104-104, § 101(a), 110 Stat. 56 (Feb. 8, 1996) (to be codified at 47 U.S.C. § 251(d)(3)(A)), expressly strips the Commission of the authority to mandate the terms and conditions of local interconnection agreements. While the Commission is charged with establishing general rules governing interconnection, the specific terms and conditions of interconnection agreements are fashioned through negotiations by the parties, subject to arbitration and approval by State Commissions. 47 U.S.C. § 252. The FCC is not permitted by the Act to interfere in this process. Moreover, as the Act makes clear, no regulator can mandate bill-and-keep arrangements. Such agreements can arise only by

[1]Pursuant to Section 1.1206(a)(1) of the Commission's rules, 47 C.F.R. § 1.206(a)(1), the original and two copies of this ex parte letter have been filed contemporaneously with the FCC's Secretary's office.

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agreement of the parties to "waive" their right to mutual recovery. § 252(d)(2)(B)(i).

I. THE COMMISSION HAS NO AUTHORITY TO MANDATE THE TERMS AND CONDITIONS OF LOCAL INTERCONNECTION AGREEMENTS

The 1996 Act imposes a general duty of interconnection on each "telecommunications carrier," § 251(a), a definition that includes CMRS providers, § 153(B)(49). In addition, the Act imposes certain interconnection obligations on incumbent LECs alone in their relations with "any requesting telecommunications carrier." § 251(c). The terms and conditions of interconnection are to be worked out by agreement among the carriers, subject to the negotiation, arbitration, and approval procedures set forth in Section 252.

The new Act requires the Commission to adopt regulations to implement the interconnection obligations in Section 251. See § 251(d). But the Act makes clear, in both Section 251 and again in Section 252, that the Commission cannot preempt state authority over the specific terms and conditions contained in those agreements. This is consistent with Section 151(b)'s preservation of State authority over charges for intrastate communications services.

A. Section 251 Expressly Preserves State Authority Over the Terms and Conditions of Local Interconnection Arrangements.

Despite granting the Commission authority to establish general rules implementing the interconnection obligations of Section 251, the Act flatly prohibits the Commission from prescribing or enforcing any regulation that "preclude[s] the enforcement of any regulation, order, or policy of a State commission that . . . establishes . . . interconnection obligations of local exchange carriers," provided that the state rule is consistent with, and does not substantially prevent implementation of, the requirements of Section 251. § 251(d)(3).

There is no question that state regulations governing LEC-CMRS interconnection compensation establish "interconnection obligations of local exchange carriers" within the meaning of Section 251(d)(3)(A). Section 251 itself specifically designates, as a LEC obligation, the duty to establish "reciprocal compensation arrangements for the transport and termination of telecommunications." § 251(b)(5). And state compensation arrangements implement this duty by dictating the charge (or directing the parties to negotiate a charge) applicable to interconnection. Thus, they establish LEC interconnection obligations for purposes of the savings clause.

The 1996 Act is therefore clear: the Commission may not preempt state regulations establishing local interconnection obligations unless they are inconsistent with the requirements of Section 251. There is nothing in Section 251 (or any other provision of the Act) that conflicts with state interconnection arrangements that permit mutual compensation, rather than bill-and-keep. To the contrary, such policies are entirely consistent with Section 251's requirement that the LECs establish "reciprocal compensation arrangements for the transport and termination of telecommunications." § 251(d)(5). Thus, the Commission cannot preempt state authority over mutual compensation arrangements by mandating bill-and-keep arrangements.

B. Section 252 Leaves the Particular Form of Compensation Arrangement to Negotiation, Arbitration and Approval by State Commissions.

Section 252 reinforces the point that the FCC has no authority to dictate any particular form of compensation arrangement beyond Section 251's general mandate of reciprocal compensation. Section 251(c) requires the LECS "to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements" to fulfill their newly-imposed duties, including the duty to establish reciprocal compensation arrangements. Section 252, in turn, prescribes procedures for negotiating such agreements, subject to arbitration and approval by state commissions.

The Commission itself has no role to play in the Section 252 process, unless a State Commission simply fails to act. See § 252(e)(5). If the Commission were free to dictate a particular compensation arrangement, then the Section 252 process would be rendered meaningless. The Commission would be usurping a role that Congress intended to be played by the carriers themselves, subject to arbitration and approval by the States.

C. The New Act is Consistent with Section 151(b)'s Preservation of State Authority over Charges for Intrastate Communications Services.

The new Act's preservation of state authority over interconnection agreements is, in light of the overwhelmingly intrastate nature of such agreements, consistent with the existing Communications Act.[2] Section 152(b) of the existing Act

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[2]In the wireless context, the great majority of local traffic that terminates on LEC facilities (as opposed to being handed off to an interexchange carrier) will be intrastate traffic. In the wireline context, obviously the percentage of

deprives the Commission of jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier," except as provided in Sections 223 through 227, and Section 332. 47 U.S.C. § 152(b) (emphasis added). Old section 152(b) thus dovetails with new Sections 251 and 252, which leave it to the States to control the specific terms and conditions of interconnection agreements.

Some commentators in the NPRM proceeding argued that Section 332(c)(3)(A) gives the Commission exclusive jurisdiction over interconnection compensation agreements for CMRS providers. But that section merely limits the power of the States "to regulate the entry of or the rates charged by any commercial mobile service . . . ." 47 U.S.C. § 332(c)(3)(A) (emphasis added). The underscored language refers to the amount charged by CMRS providers to their subscribers, rather than the amount CMRS providers pay for interconnection. See also 47 U.S.C § 332(c)(3)(A)(i) (permitting states to petition for authority to regulate rates if "market conditions with respect to [CMRS] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory"). Thus, Section 332(c)(3)(A) does not deprive the States of jurisdiction over interconnection compensation agreements between LECS and CMRS providers.[3]

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local traffic that is intrastate will approach 100%. It was quite reasonable, therefore, for Congress to conclude that local interconnection agreements should be left largely to state control. To the extent that there is an "inseverability" problem here -- see NPRM ¶ 111 ("preemption under Louisiana PSC may well be warranted here on the basis of inseverability"); but see CMRS Second Report and Order, 9 FCC Rcd 1411, at ¶ 231 (1994) (interstate and intrastate traffic can be severed for regulatory pricing purposes) -- Congress has made a judgment to entrust local interconnection agreements to the States, not to the FCC.

[3]The Commission itself made precisely this point in a recent Report and Order:

> [W]e note that Louisiana's regulation of the interconnection rates charged by landline telephone companies to CMRS providers appears to involve rate regulation only of the landline companies, not the CMRS providers, and thus does not appear to be circumscribed in any way by Section 332(c)(3).

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Interconnection between LECs and CMRS is covered by Section 332(c)(1)(B), not 332(c)(3), and Section 332(c)(1)(B) simply states that physical interconnection arrangements must be established "pursuant to the provisions of section 201 of this Act." Section 201 has never been thought to trump state rate making authority under Section 152(b). Nor does it now trump the new interconnection agreement procedures of Sections 251 and 252.

Arguably, the FCC may have jurisdiction to ensure that, in setting or approving particular interconnection agreements, the States do not effectively preclude entry by CMRS providers. See NPRM ¶ 111. But a general authority to sweep away state-imposed barriers to entry does not entail any authority to mandate the particular terms and conditions of interconnection. Only if a State's rules "substantially prevent implementation of the requirements of [Section 251]" does the Commission's authority to preempt come into play. See § 251(d)(3).

In this respect, it is worth noting that, while Section 253 -- which eliminates state entry barriers -- expressly preserves the Commission's parallel authority under Section 332(c)(3), neither Section 251 nor Section 252 contain a similar provision. This demonstrates Congress' recognition that entry barriers can be preempted and interconnection can be mandated without preempting state authority over the precise terms and conditions of interconnection. Certainly, there is no evidence in the record of this proceeding that state-approved terms of interconnection have acted, or will act, as a barrier to entry.

II. No Regulator Can Mandate Bill-and-Keep Arrangements

Even if the FCC did have authority to mandate particular compensation arrangements, it could not lawfully mandate a bill-and-keep arrangement. Not even state regulators can do that.

By using the term "reciprocal compensation" in Section 251(b)(5), Congress clearly contemplated some form of interconnection cost recovery. See also § 252(d)(2)(A) (for the purposes of compliance with section 251(b)(5), any reciprocal compensation arrangement voluntarily negotiated by a LEC must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of calls that originate on the other's network, determined on the basis "of a reasonable approximation of the additional cost of terminating such calls").

Radio Services Offered Within the State of Louisiana, 10 FCC Rcd. 7898, 7908 (1995).

The Commission's proposed bill-and-keep arrangement permits no cost recovery. But that is permissible under the statute only if there is an "offsetting of reciprocal obligations," § 252(d)(2)(B)(i), as might occur when both parties terminate roughly equal amounts of traffic. That is not the case in the wireless context. LECs terminate much more traffic for wireless providers than vice versa. See NPRM ¶ 14. The parties may agree to "waive mutual recovery," § 252(d)(2)(B)(i). But waiver is a voluntary process. It cannot be forced. Thus, regulators have no authority to mandate such arrangements.

Respectfully submitted,

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cc: Karen Brinkmann